IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 295 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG
HONOURABLE MR.JUSTICE D.H.WAGHELA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX - Applicant(s)
Versus
GUJARAT STATE FOREST DEVELOPMENT CORPN LTD - Respondent(s)

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Appearance :
MS.MONA M BHATT for Applicant(s) : 1,
MR MANISH J SHAH for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

and

HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 12/10/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.S.GARG)

1. Mrs. Mona Bhatt, learned counsel for the Revenue, Mr. M.J. Shah, learned counsel for the respondent-assessee.

2. The Income Tax Appellate Tribunal, Ahmedabad Bench “C” has referred the following questions under Section 256[1] of the Income Tax Act, 1961 for the opinion of this Court at the instance of the Revenue, which arise out of Income Tax Appeal No. 1863/Ahd./1990 pertaining to Assessment Year 1985-86.

> 1] Whether, on the facts and in the circumstances of the case and in law the tribunal is right in cancelling the order u/s. 263 of the Act, in which the Assessing Officer's order was set aside?
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> [2] Whether, on the facts and in the circumstances of the case the tribunal was right in law in holding that the royalty cannot be treated as 'tax' or 'duty' within the meaning of Sec.43-B, when it is clearly mentioned in the decisive portion of the judgment of Supreme Court reported at 188 ITR 690 that royalty is a tax?”

3. In the present case, the Tribunal held that royalty cannot be treated as a tax or duty within the meaning of Section 43-B. The Revenue submitted that in view of the judgment of the Supreme Court in the matter of **India Cement Ltd., v. State of Tamil Nadu, reported in 188**

ITR 690, royalty is to be treated as tax and under the circumstances, Section 43-B was applicable to the facts of the case.

3. The judgment, in the matter of India Cement Ltd. [supra] has been critically analyzed by the Supreme Court in the matter of **State of West Bengal v. Kesoram Industries Ltd., reported in 2004 266 ITR 721.** The Apex Court observed that except some typographical mistake, it appeared from the judgment of the India Cement Ltd. that royalty would be treated as tax or duty. The Apex court further observed that in fact, the intention of the earlier Bench of the Apex Court was to hold that royalty would not be a tax or duty.

4. Observing the judgment in the matter of Kesoram Industries in ITR No. 23 of 2001 in the case of C.I.T. v. Gujarat State Forest Development Corporation Ltd., decided on 31.8.2006, we have taken the view that royalty is not a tax. In view of the authoritative judgment of the Supreme Court, which has been followed by this Court, we find no difficulty in holding that the Tribunal was justified in holding that royalty cannot be equated or treated as a tax or duty for purposes of Section 43-B of the Act.

5. So far as the first question is concerned, we must hold that in view of the answer to second question, there would be no occasion to start proceeding under Section 263 of the Act. The Commissioner of Income Tax could exercise his

powers under Section 263 only if foundational facts were before him and he was justified in recording a finding that royalty is a tax or duty for purposes of Section 43-B of the Act.

6. In our opinion, the Tribunal was justified in cancelling the order passed under Section 263 of the Act. The Reference is accordingly answered against the interest of the Revenue and in favour of the assessee. The Reference stands disposed of. No costs.

[R.S. GARG, J.]

[D.H. WAGHELA, J.]

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